IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-5353

RUFUS JUNIOR MINCEY, Petitioner

vs.

THE STATE OF ARIZONA, Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRUCE E. BABBITT
The Attorney General

PHILIP G. URRY
Assistant Attorney General
1005 Pioneer Plaza
100 N. Stone Ave.
Tucson, Arizona 85701

Attorneys for Respondent

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-5353

RUFUS JUNIOR MINCEY, Petitioner

vs.

THE STATE OF ARIZONA, Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRUCE E. BABBITT
The Attorney General

PHILIP G. URRY
Assistant Attorney General
1005 Pioneer Plaza
100 N. Stone Ave.
Tucson, Arizona 85701

Attorneys for Respondent

I N D E X

TABLE OF CASES AND AUTHORITIES

TABLE OF CASES AND AUTHORITIES
(Continued)

JURISDICTION OF THIS COURT

Petitioner seeks review on writ of certiorari of the judgment of the Supreme Court of Arizona pursuant to 28 U.S.C. § 1257(3). Rule 19 of the Rules of the United States Supreme Court provides in part:

> "Rule 19. Considerations Governing Review on Certiorari.
> 1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

The substance of his petition reveals

no special or important reasons for review on writ of certiorari. Moreover, the facts out of which the case arose are unique, and hence the decision below has no significant national impact. Finally, despite technical claims of error raised by Petitioner, the decision of the Supreme Court of Arizona was just. This is not an appropriate case for certiorari.

QUESTIONS PRESENTED

1. Whether the examination and search of Petitioner's apartment immediately after a police officer was fatally shot therein in the course of an arrest based upon probable cause, for the limited purpose of determining the circumstances of the officer's death, was unreasonable within the meaning of the Fourth Amendment to the United States Constitution.

2. Whether certain statements written by Petitioner in response to brief questioning by a police detective during Petitioner's recovery in the hospital were properly used to impeach Petitioner's testimony at trial.

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case except to the extent amplified or controverted in the Arguments that follow.

ARGUMENT

I

THE EXAMINATION AND SEARCH OF PETITIONER'S APARTMENT IMMEDIATELY AFTER A POLICE OFFICER WAS FATALLY SHOT THEREIN IN THE COURSE OF AN ARREST BASED UPON PROBABLE CAUSE, FOR THE LIMITED PURPOSE OF DETERMINING THE CIRCUMSTANCES OF THE OFFICER'S DEATH, WAS NOT UNREASONABLE WITHIN THE MEANING OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Introduction

There are three distinct reasons why this Court should decline to exercise its jurisdiction to grant certiorari on the search issue in this case:

1. Petitioner could not legitimately claim a reasonable expectation of privacy with respect to the premises where he had recently had a gun battle with a police officer that resulted in serious injury to four people.

2. Application of the per se unreasonableness rule of United States -v- Chadwick, ____ U S ____, 97 S.Ct. 2476 (1977), Coolidge -v- New Hampshire, 403 U S 443 (1971) and Katz -v- United States, 389 U S 347 (1967) in this case would produce the anomalous result of invalidating a search that was patently reasonable under all the circumstances.

3. The state courts' murder scene exception to the warrant requirement is a

recent, developing doctrine that by its nature is infrequently applied. Based on the limited experience of the courts in this unique area, it would be premature for the Court to intervene at this time.

Reasonable Expectation of Privacy

Since Katz -v- United States, 389 U S 347 (1967) it has been settled that Fourth Amendment focuses not upon the nature of the location that is subjected to examination, but rather on the question of whether the examination invaded any affected person's reasonable expectation of privacy. As this Court stated in Katz:

> " . . . the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection. See Lewis -v- United States, 385 U S 206, 210; United States -v- Lee, 274 U S 559, 563. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 389 U S at 351.

The Court made it clear in United States -v- Santana, 427 U S 38 (1976) that a person may lack a reasonable expectation of privacy even in an area closely associated with his or her residence. In Santana, police officers who had probable cause to arrest the defendant on narcotics charges drove up to her residence and saw her standing in the open doorway. They shouted "police" and ran toward her, while she retreated into her house. She was captured within, and narcotics were found. This Court upheld the warrantless arrest as having taken place in public within United States -v- Watson, 423 U S 411 (1976) (Stewart, J., concurring). In so holding, the Court specifically stated that the defendant was not in an area where she had any expectation of privacy, citing Katz, supra.

Applying Katz and Santana in the

instant case yields the conclusion that at the time of the search of which Petitioner complains, he had no reasonable expectation of privacy with respect to his apartment. The Court must bear in mind that this is not a case in which the police officers' initial intrusion was illegal. To the contrary, at the time of the intrusion the officers had direct, fresh information that Petitioner currently possessed a quantity of heroin and had recently made an unlawful offer to sell some of it. Their entry into the apartment was based upon probable cause to arrest Petitioner, and Petitioner does not challenge the legality of that entry.

Immediately after the police entered Petitioner's apartment, a shooting incident occurred between Petitioner and Officer Barry Headricks in which a total of four people sustained gunshot wounds. Because both participants were unconscious after

the shooting ceased, no one knew exactly what had occurred. Under those circumstances, Petitioner could not reasonably have expected that his premises would remain free from an immediate and thorough police investigation into exactly what had given rise to the shooting incident and its aftermath. The failure to obtain a warrant hence did not render the results of the investigation inadmissible.

Per se unreasonableness

Petitioner principally relies on the often-repeated rule that a warrantless search is per se unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions. United States -v- Chadwick, ____ U S _____, 97 S. Ct. 2476 (1977); Coolidge -v- New Hampshire, 403 U S 443 (1971); Katz -v- United States, 389 U S 347 (1967). Language in other decisions

of this Court, however, has recognized that rigidity is inappropriate in certain Fourth Amendment contexts. The Court stated in Ker -v- California, 374 U S 23 (1963):

> "This Court's long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application is carried forward when that amendment's proscriptions are enforced against the States through the Fourteenth Amendment. * * *
> The States are not . . . precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complaint." 374 U S at 33, 34.

And in Terry -v- Ohio, 392 U S 1 (1968) this Court stated:

> "The exclusionary rule has its limitations, however, as a tool of judicial control. It cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections." 392 U S at 13.

More recently, in United States -v- Edwards, 415 U S 800 (1974), the Court upheld the warrantless seizure of clothing from an arrestee in state custody. In discussing Cooper -v- California, 386 U S 58 (1967) the Court stated:

> "It was no answer to say that the police could have obtained a search warrant, for the Court held the test to be, not whether it was reasonable to procure a search warrant, but whether the search itself was reasonable, which it was." 415 U S at 807.

The instant case points up a potential shortcoming of the per se unreasonableness rule, because to apply that rule blindly on these facts would result in

the mechanical invalidation of a patently reasonable search. The police initially entered Petitioner's apartment for the purpose of making lawful narcotics arrests. While the officers were engaged in effecting these arrests, a gun battle erupted in an adjoining room, leaving four people wounded. The officers were thus confronted with unmistakable evidence that a homicide had been committed. At the same time, because of the way in which the shooting incident occurred, the officers were completely in the dark as to the criminal or non-criminal nature of the homicide and the exact circumstances under which it occurred. As police officers, they had a duty to make an immediate and thorough investigation. Because Petitioner's reasonable expectation of privacy had already substantially dissipated as a result of the earlier lawful entry, the officers' examination of the

apartment to determine the circumstances of the shooting was reasonable within the Fourth Amendment.

Murder Scene Exception

The opinion of the Supreme Court of Arizona in State -v- Mincey, ____ Ariz. ____, 566 P.2d 273 (1977) upheld the denial of Petitioner's motion to suppress on the ground that

> "the search of a murder scene under certain circumstances [is] a valid exception to the constitutional warrant requirement." 566 P.2d at 283.

The Arizona Court first applied this doctrine in State -v- Sample, 107 Ariz. 407, 489 P.2d 44 (1971). There the defendant asked a neighbor for help and the neighbor summoned police. When the police arrived at defendant's mobile home, defendant exclaimed, "My God, I killed my wife." His wife's body was discovered in a bedroom, and defendant was conveyed to

the police station. About two hours later a police officer searched the mobile home without a warrant and seized certain tangible evidence. The Supreme Court of Arizona sustained the search, stating:

> "Reviewing the facts and circumstances in this case, ' the total atmosphere', we are convinced that the search was reasonable within the framework of the Fourth Amendment and the reasons for its existence. The traditional right of citizens to be free from unreasonable searches and seizures and unreasonable and unnecessary invasions of their privacy is not violated when the premises upon which a deceased victim is found are searched without a warrant." 107 Ariz. at 410.

A divided panel of the United States Court of Appeals for the Ninth Circuit later disapproved the search without addressing itself to the Arizona Supreme Court's rationale. Sample -v- Eyman, 469 F.2d 819 (9th Cir. 1972). Judge Jertberg dissented, adopting the opinion of the Supreme Court of Arizona as his dissenting opinion.

469 F.2d 819, 822-26.

In State -v- Duke, 110 Ariz. 320, 518 P.2d 570 (1974), the Supreme Court of Arizona distinguished Sample -v- Eyman, supra, and narrowed the rationale of State -v- Sample, supra, to validate a warrantless murder scene search conducted at the time the body was discovered. State -v- Superior Court, 110 Ariz. 281, 517 P.2d 1277 (1974). The Arizona Supreme Court's most recent refinement of the State -v- Sample rule occurred in its opinion in the instant case. There the court significantly narrowed the rule, as follows:

> "After reviewing this issue we are reaffirming our rule. We will set some guidelines, however, because we support the principle that '[s]earches conducted without a warrant issued upon probable cause are "per se unreasonable * * * subject only to a few specifically established and well-delineated exceptions". Schneckloth -v- Bustamonte, 412 U S 218 at 219, 93 S. Ct. 2041, at 2043, 36 L.Ed 2d 854 at 858 (1973)' State -v- Sardo,

> 112 Ariz. 509, 541 P.2d 1138 (1975). With the guidelines, infra, in this opinion, search of a murder scene is such a 'specifically established and well-delineated exception.' We hold a reasonable warrantless search of a homicide - or of a serious personal injury with likelihood of death where there is reason to suspect foul play - does not violate the Fourth Amendment to the United States Constitution where the law enforcement officers were legally on the premises in the first instance. We chose not to limit this warrant requirement exception only to actual murders because immediate action may be important to determine the circumstances of death and because a reasonable search should not later be invalidated because the intended murder victim may be saved by a medical miracle. For the search to be reasonable, the purpose must be limited to determining the circumstances of death and the scope must not exceed that purpose. The search must also begin within a reasonable period following the time when the officials first learn of the murder (or potential murder). Cf. State -v- Duke, supra." 566 P.2d at 283; Slip Opinion at 23.

It is apparent from examining State -v- Sample, supra, State -v- Duke, supra,

and State -v- Mincey, supra, that Arizona's murder scene exception is not a static doctrine which is mechanically applied to validate a broad range of warrantless searches. Cases in which the murder scene exception can be applied have arisen infrequently, and the exception has become narrower and better defined with each application. The murder scene exception is an evolving doctrine of relatively recent origin. The cases that have applied it [1] have significant potential for developing into a coherent and correct body of law covering a unique situation that does not fit into normal search and seizure categories. But because the doctrine is recent and the cases that apply it are few, this Court should decline to review it

---

1/ See cases cited in State -v- Mincey, ____ Ariz. ____, 566 P.2d 273, 283 n.4; Slip Opinion at 22.

until its parameters are more fully developed by further applications in other fact situations.

Assuming the Court wishes to reach the merits, it should adopt the Arizona Supreme Court's formulation of murder scene exception as a proper and reasonable exception to Fourth Amendment's warrant requirement. The Arizona court's formulation is specifically designed to validate the immediate investigation of the scene of an actual or potential homicide for the limited purpose of discovering the circumstances thereof. The crucial limiting factor is that the murder scene exception applies only in those rare instances where the police have lawfully entered the premises of the search in the first instance. See, e.g., People -v- Wallace, 31 Cal. App. 3d 865, 107 Cal. Rptr. 659 (1963); State -v- Oakes, 276 A.2d 18 (129 Vt. 241) (1971), cert. denied, 404 U S 965 (1971). For that reason the

murder scene exception can never be used to justify an initial warrantless intrusion. Moreover, the murder scene exception is limited to homicide or potential homicides. As the court stated in State -v- Chapman, 250 A.2d 203 (Me. 1969):

> "There is no more serious offense than unlawful homicide. The interest of society in securing a determination as to whether or not a human life has been taken, and if so by whom and by what method, is great indeed and may in appropriate circumstances rise above the interest of an individual in being protected from governmental intrusion upon his privacy. In our view this is such a case. We see here no more than the 'legitimate and restrained investigative conduct undertaken on the basis of ample factual justification' which is not proscribed by the Fourth Amendment. Terry -v- State of Ohio, supra. The public had a right to expect and demand that the police would conduct a prompt and diligent investigation of these premises to ascertain the cause of this apparently violent death and to solve any crime committed in the course thereof. 250 A.2d at 210-11.

This Court should exercise its discretion to deny review on writ of certiorari on the question of the search of Petitioner's apartment.

ARGUMENT

II

PETITIONER'S WRITTEN RESPONSES TO DETECTIVE HUST'S QUESTIONING WERE PROPERLY USED TO IMPEACH PETITIONER'S TESTIMONY.

On October 28, 1974 Detective Hust of the Tucson Police Department questioned Petitioner at the Arizona Medical Center about four hours after he underwent surgery for his gunshot wounds. Although Petitioner was unable to speak, he wrote approximately six pages of answers on Arizona Medical Center "Flow Sheets". See Defendant's Exhibit D. At trial, the prosecutor used two of Petitioner's written responses to impeach his testimony. Petitioner now contends this was improper under Oregon -v- Hass, 420 U S 714 (1975) and Harris -v- New York, 401 U S 222 (1971). Specifically,

he contends (1) the impeaching statements were not inconsistent with his testimony and (2) the impeaching statements were untrustworthy and involuntary. He is wrong on both counts.

Inconsistency

In Harris -v- New York, 401 U S 222 (1971) this Court held that the petitioner's prior inconsistent statements, which were admittedly obtained in violation of Miranda -v- Arizona, 384 U S 436 (1966), could nonetheless be used to impeach his testimony at trial. The Court stated:

> "It does not follow from Miranda that evidence admissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards." 401 U S at 224.

The question of the degree to which the impeaching statements were inconsistent with the petitioner's testimony played no part in the court's analysis. In Oregon

-v- Hass, 420 U S 714 (1975) the Court reaffirmed Harris, and again the degree of inconsistency was not discussed as part of the constitutional analysis.

Petitioner nevertheless contends the use of his written statement for impeachment violated Harris and Oregon because the statements were not inconsistent with his testimony. Contrary to the implication Petitioner seeks to raise, neither Harris nor Oregon require any particular degree of inconsistency as a constitutional matter. And United States -v- Hale, 422 U S 171 (1975), which recognized the requirement of inconsistency as a matter of general evidence law, expressly declined to rest its holding on constitutional grounds.

Assuming the question of inconsistency is material to Petitioner's constitutional claims, however, the record shows that Petitioner's written statements were in fact sufficiently inconsistent with his

testimony to provide "valuable aid to the jury in assessing petitioner's credibility . . . ." Harris -v- New York, 401 U S 222, 225. At trial, Petitioner testified:

"Q. You're quite sure that Officer Headricks fired at you first?

"A. Yes, sir.

"Q. You saw a gun in Officer Headrick's hand?

"A. Yes, sir.

"Q. What kind of gun?

"A. It was just a gun."

(R T June 6, 1975, p. 231, lines 10-17).

The prosecutor questioned Petitioner as follows concerning the written statements he had made to Detective Hust in the hospital:

"Q. Do you recall being asked, or do you recall telling Detective Hust at that time that you weren't even sure that

the guy who came in the bedroom had a gun?

"A. I can't say for sure because I don't know what I -- which guy he was talking about."

(R T June 6, 1975, p. 235, lines 16-21).

The statements the prosecutor referred to were as follows:

"When I heard all the noise I run out to check it out then I went back to the bedroom. Where was Chuck I can't say for sure maby the guy had a gun." Defendant's Exhibit D.

From the context of the written statement it is clear that the "guy" was the officer with whom Petitioner exchanged gunfire. The written statement expressing uncertainty about whether the "guy" had a gun was inconsistent with Petitioner's assertion at trial that he had seen the gun in his hand. The impeachment was therefore proper. Petitioner attempted to explain the inconsistency by saying he had not known

whether Detective Hust had been referring to Officer Headricks or the officer who stood over him after he had been shot. Although this explanation might have affected the weight of the impeachment, the trial court was not bound by it in ruling on admissibility.

Petitioner also testified:

"Q. (By Mr. Howard): Well, let me ask a further question. You suspected that it might be an arrest, a bust, didn't you?

"A. No, sir.

"Q. That never entered your mind?

"A. At what time?

"Q. At the time that Officer Headricks was coming across this room and you went and got your gun and started firing at him?

"A. No, sir.

"Q. Never entered your mind?

"A. No sir."

(R T June 6, 1975, p. 252, line 21 - p. 253, line 6).

The prosecutor thereafter impeached Petitioner's testimony by showing that he had intially called the incident a "bust" in responding to Detective Hust's questions in the hospital. Although Petitioner explained that he called it a "bust" because he had learned earlier that he had shot a police officer, the inconsistency remained, and the trial court was not bound to accept his explanation.

Trustworthiness

Petitioner also contends the use of his written statements against him violated Harris, supra, and Oregon, supra, because the statements were involuntary and untrustworthy. Petitioner bases this contention on an incomplete and sometimes inaccurate statement of the circumstances surrounding

the questioning of Petitioner in the hospital. Detective Hust testified:

"Q. Had you received permission prior to talking to him, from hospital personnel?

"A. Yes.

"Q. From whom?

"A. I believe I talked with Dr. Farrel, and again the nurses checked with somebody to get it authorized."

(R T February 3, 1975, p. 170 lines 11-18).

Detective Hust also testified:

"Q. Did you ever stop questioning Mr. Mincey when he asked for an attorney?

"A. I believe I advised him if he wanted an attorney I could no longer talk to him. Also that he had the right to refuse to answer any

question he wished to.

"Q. Did he ever report his responses to that question anywhere in his statement, that he wished to begin talking to you?

"A. No, I don't believe so. I believe it was with an affirmative nod of the head."

(R T February 3, 1975, p. 165 line 19 - p. 166, line 2).

The record thus does not support Petitioner's contention that he was forced to continue answering questions when he wished to stop.

Petitioner asserts that he lapsed into unconsciousness at least twice during questioning by Detective Hust. Detective Hust, however, testified that Petitioner did not lose consciousness at any time during the course of the questions and answers. (R T February 3, 1975, p. 184, lines 5-8). Moreover, when Petitioner

appeared to become tired and slow down, Detective Hust voluntarily left the room. (R T February 3, 1975, pp. 186-87).

Petitioner states that he "indicated repeatedly that he wished the questioning discontinued." Detective Hust, however, testified:

"Q. Did he other than the mention of a lawyer on several occasions, did he tell you he didn't want to talk to you?

"A. No.

"Q. Did he at any time, in fact, request that you return and talk to him again?

"A. Yes.

"Q. Did you do anything to force or duress or use duress in any way with regard to Mr. Mincey?

"A. No.

(R T February 3, 1975, p. 184, lines 5-19).

Elizabeth Graham testified she did not know whether Petitioner had received any drugs while in the hospital. There was no evidence that he had received any drug that would have impaired his mental functioning. Ms. Graham testified:

"Q. Were there any head injuries?

"A. No.

"Q. Did Mr. Mincey appear to be alert and understand what questions Detective Hust asked him?

"A. Yes.

"Q. Did Detective Hust or anyone else that was present do anything to force Mr. Mincey to answer questions?

"A. No.

"Q. Did anybody physically abuse Mr. Mincey during the course of the questions by

Detective Hust?

"A. No sir.

"Q. Did anyone mentally abuse Mr. Mincey, that is, threaten him or call him names during the course of this procedure?

"A. No."

(R T February 3, 1975, p. 196, lines 4-19).

Finally, the lucidity and continuity of Petitioner's written statements belie his claim of involuntariness and untrustworthiness. For example, Petitioner wrote as follows:

> "No Body knew John + his old lady went for a walk to see where Chuck went. They came back and said Chuck was in the car with 2 guys. One of the guys came with Chuck. He left and when he came back all hell turned loose. When he came back a bust took place. Bust. You see I'm not for sure. People were all over the house. I couldn't figure out wheather it was a bust or rip-off." Defendant's Exhibit D.

And:

> "This infromation was given so that It might Bring this case to a end. You asked me some questions and I answered to the best of my ability at the present time. This is not to say I can't change my Infromation at a later Date, because I'm not sure as of now." Defendant's Exhibit D.

There is no basis in the record for Petitioner's claim that his statements were involuntary and untrustworthy in violation of Harris, supra, and Oregon, supra. This Court should decline to review Petitioner's voluntariness claim on writ of certiorari.

CONCLUSION

For the foregoing reasons, Respondent respectfully urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

BRUCE E. BABBITT
The Attorney General

Philip G. Urry

PHILIP G. URRY
Assistant Attorney General

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
)ss.
County of Pima)

PHILIP G. URRY, being first duly sworn deposes and says:

I am an Assistant Attorney General for the State of Arizona. As such I did cause to be hand delivered on the 23rd day of September, 1977 three (3) copies of BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to:

FREDERICK S. KLEIN
KLEIN & KLEIN
306 Pioneer Plaza
100 N. Stone Ave.
Tucson, Arizona 85701

and three (3) copies of BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to be deposited in the United States mail addressed to:

RICHARD OSERAN
BOLDING, OSERAN & ZAVALA
P. O. Box 70
La Placita Village
Tucson, Arizona 85702
Attorneys for Petitioner

and mailed on the 23rd day of September, 1977.

All parties required to be served have so been served.

Philip G. Urry
PHILIP G. URRY

SUBSCRIBED AND SWORN to before me the undersigned Notary Public on this the 23rd day of September, 1977.

Sarah E. Milosky
Notary Public

My Commission Expires:
12-9-80